

FORBES (Migration) [2017] AATA 2548 (1 September 2017)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs Mary Kathleen Omaoid Forbes
CASE NUMBER:	1619027
DIBP REFERENCE(S):	BCC2014/3596695
MEMBER:	Moira Brophy
DATE:	1 September 2017
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211 of Schedule 2 to the Regulations, and • cl.820.221(1) and (2) of Schedule 2 to the Regulations.

Statement made on 01 September 2017 at 2:37pm

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) - Genuine spousal relationship – Sponsor deceased – Whether relationship would have continued – Emotional companionship – Applicant cared for sponsor – Joint finances

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, r 1.15A, Schedule 2, cl 820.211, cl 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 2 November 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 31 December 2014 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied the applicant was the spouse, as defined, of the sponsor.
4. The applicant appeared before the Tribunal on 24 July 2017 and on 24 August 2017 to give evidence and present arguments. The Tribunal also received oral evidence from Ms Amanda Jane Forbes. The Tribunal was assisted at the time of the second hearing by an interpreter in the Filipino and English language.
5. The applicant was represented in relation to the review by her registered migration agent.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

BACKGROUND

7. The applicant was born on 18 January 1989 in the Philippines. She is now 28 years old. She has declared no previous relationships. The applicant's parents and younger brother reside in the Philippines. Her twin sister resides in USA.
8. The applicant first arrived in Australia on 19 October 2012 on a student visa (subclass 572).
9. The applicant's sponsor was born in Australia in 1942 and was 64 years old at the time of application. He was previously married to Ms Amanda Forbes in the period from 1991 to 2014. There were three children from a prior undisclosed relationship.
10. On their application forms the applicant and her sponsor indicated that they met in the Philippines in April 2011. A defacto relationship commenced on 19 October 2012. The sponsor separated from his wife in December 2013 and they divorced in December 2014. The applicant and the sponsor were married on 1 May 2015.
11. In the Record of Decision, a copy of which the applicant provided to the Tribunal, the delegate stated that she was not satisfied that at the time of application the applicant and her sponsor had shared mutual obligation, companionship, emotional support and long-term planning. She concluded that the applicant and sponsor were not in a genuine and continuing spousal relationship.

12. On 2 June 2017 the applicant's migration agent provided a submission to the Tribunal which advised that the applicant's sponsor had died on 9 May 2017 due to cancer. The submission included statutory declarations from the applicant and the sponsor, statutory declarations attesting to the genuineness of the relationship, a reference from the parish priest of the Catholic Church at Foster/Tuncurry, a statement from Ms Amanda Forbes (ex-wife of the sponsor), photographic evidence, bank statements for accounts held in both the name of the applicant and in joint names, utility bills, various greeting cards addressed to both the applicant and the sponsor, a copy of the last will and testament of the sponsor dated 3 December 2014, and an excerpt from an agreement between the sponsor and his previous wife as to his right to reside in the property.
13. On 24th of July 2017 the applicant's migration agent provided a submission, a copy of the death certificate for the sponsor and a letter from the employer of the applicant.
14. On 18 August 2017 the applicant's migration agent provided an additional statutory declaration from the applicant, a letter from the Taree Medical Center where the sponsor had received medical treatment, a copy of the certificate of title for the property where the sponsor and applicant resided showing the property was owned by the former wife of the sponsor, a PAYG payment summary for the period ended 30th of June 2017 for the applicant, a letter dated 1 August 2017 from the employer of the applicant, a statutory declaration from the former wife of the sponsor Ms Amanda Jane Forbes, additional bank statements and miscellaneous receipts.
15. **TRIBUNAL HEARING**
16. The applicant appeared before the Tribunal to give evidence on 24 July 2017. It was apparent to the Tribunal that the applicant would benefit from having an interpreter in her first language present. The hearing was adjourned to allow the Tribunal to arrange for an interpreter to be present on the next occasion. On 24 August 2017 the hearing was reconvened with an interpreter on hand to assist the applicant.

CONSIDERATION OF CLAIMS AND EVIDENCE

17. The issue in the present case is whether the applicant was in a genuine and continuing spousal relationship with her sponsor at the time of application, and if so, whether she would have continued to be the spouse of her sponsor if he had not died, and if so, whether the applicant has developed close business, cultural or personal ties in Australia.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

18. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case, the applicant claims to be the defacto partner of the sponsor who was an Australian citizen at the time of application.
19. The applicant and the sponsor married after the application was lodged.
20. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d).

In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

21. If the parties were validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. There is nothing in the information before the Tribunal to cast doubt on the validity of the marriage on 1 May 2015, and it was not disputed by the delegate. Consequently, in the absence of any evidence to the contrary, the Tribunal finds that the marriage between the parties was a valid marriage for the purposes of the Act, as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

22. *Financial*
23. The applicant gave evidence that she was currently employed at a childcare centre working four days a week. She had just been promoted to the position of team leader. She was paid \$29.01 per hour and her pay was deposited into the joint account she held with the sponsor each fortnight. The sponsor had been in receipt of an age pension from Centrelink. The parties resided together in a home owned by the former wife of the sponsor. At the time he had separated from his former wife, a life interest in the home had been created for him as part of the property settlement. The applicant has continued to reside in that home since the death of the sponsor. She pays \$100 per week rent.
24. The parties had a joint bank account which they were both able to access and operate. A perusal of the bank statements provided to the Tribunal were indicative of that account being used for every day requirements and for the payment of bills. Prior to the parties opening a joint bank account the applicant had an account in her name alone. At that time she was not in receipt of an income and the statement showed that the sponsor made deposits into that account on a regular basis to ensure the applicant had money to meet her daily needs. The sponsor had an account in his name alone into which she Centrelink payment was paid. The applicant did not have a card to operate that account.
25. At the time of application the applicant and her sponsor did not have any joint ownership of assets or joint liabilities. During the course of the relationship the sponsor purchased a vehicle to be used by the applicant. Ownership of that vehicle was transferred into her name prior to his death.
26. The Tribunal accepts that the applicant and her sponsor pooled their financial resources and shared day-to-day household expenses.
27. The Tribunal accepts the financial aspects are consistent with a genuine and continuing spouse relationship.

Nature of the household

28. The applicant gave evidence that she did the majority of the cooking as she liked to cook Filipino food for the sponsor to try. They shared the house work and outside maintenance of the property and they would do the grocery shopping together. After the applicant commenced work the sponsor would undertake the greater proportion of the chores.

29. The applicant and her sponsor did not have any joint responsibility for the care and support of children.
30. The establishment of a joint household is consistent with a genuine and continuing spouse relationship.

Social aspects of the relationship

31. The Tribunal accepts the applicant's oral evidence that the parties went to the movies, shopping and watched movies at home together. They also socialised with the sponsor's stepchildren on occasion.
32. The Tribunal is satisfied on the basis of the applicant's oral evidence, the photographs and statutory declarations provided that at the time of application the applicant and her sponsor spent time in each other's company and in the company of their family and friends. The Tribunal has also taken into account the statutory declarations provided in support of the relationship. The Tribunal has placed some weight on that evidence in forming a view that the applicant and her sponsor presented as a couple in a genuine and continuing relationship and they would have continued to do so if not for the death of the sponsor on 9 May 2017.

Nature of the persons' commitment to each other

33. The applicant and her sponsor were married on 1 May 2015. Photographic evidence shows that the wedding was attended by the stepson of the sponsor and his wife who acted as witnesses.
34. The applicant provided a copy of her sponsor's will to the Tribunal. The applicant told the Tribunal that her husband did not make another will. Bank statements provided to the Tribunal showed that in the days prior to the sponsor's death monies were transferred out of an account in his name into the joint account. In the time immediately after his death monies held in his account were transferred to the joint account in line with the sponsor's wishes that she be the beneficiary of his estate. The Tribunal accepts that the family of the sponsor's ex-wife have afforded her accommodation in the house she lived in with the sponsor and there was no indication that this arrangement would not continue.
35. The applicant provided a document to the Department which indicated that she had nominated her husband as the beneficiary of her superannuation. Although the nomination was not binding, the Tribunal considers that it demonstrates a level of commitment to the relationship on the applicant's part.
36. The Tribunal considers it significant that the applicant was the primary carer for her husband during his illness and has placed some weight on that evidence. His cancer was clearly well advanced at the time the parties were married but the Tribunal accepts that his condition did not deteriorate until just prior to his death. The applicant did not resile from answering difficult questions as to the impact his condition had on his functionality and the Tribunal has formed the view that her actions in accommodating those impacts demonstrate a commitment to the relationship at the time of application. There is no evidence to indicate that the parties' relationship changed after the application was lodged or that it had broken down.
37. The Tribunal considers the support of the sponsor's former wife and family are recognition of the role the applicant played in the sponsor's life and recognition of her devotion to him. Likewise the reference provided by the Parish Priest of the local

Catholic Church refers to the applicant being the person with the sponsor administering and caring for him at the time of his death and attests to the anguish of the applicant at the sponsor's death. Whilst acknowledging that there were many aspects of this relationship that taken at face value would not be indicative of it being a genuine and continuing relationship such as the age difference between the parties, the Tribunal has formed the view that the applicant was committed to her relationship with the sponsor at the time of application and that the parties provided one another with companionship and emotional support and that they both saw the relationship as being long-term.

38. The Tribunal accepts that the applicant and her sponsor knew each other personally and socialised together prior to the sponsor's death. The Tribunal is satisfied they were, at the time of application, in a genuine spousal relationship. The Tribunal is satisfied on the evidence that the applicant and her sponsor were committed to a shared life as husband and wife to the exclusion of all others. On the evidence before it the Tribunal is satisfied that the sponsor did not intend to withdraw his sponsorship and therefore the sponsorship and their spousal relationship would have continued if he had not died.
39. The Tribunal is satisfied that the applicant would have continued to meet the requirements of cl.820.211(2) and she has developed close business and cultural or personal ties in Australia (cl.820.221(2(c))).
40. Since her husband's death, the applicant has continued to live in the house she shared with her sponsor and she has entered into a renting arrangement with the owner of the property. She has established herself in employment and has strong and continuing links to various members of the sponsor's family. She has social links with friends she made from her involvement in her local church.
41. The Tribunal finds that at the time of decision the applicant meets the requirements of cl.820.221(1) and (2).

CONCLUSIONS

42. The Tribunal is satisfied that at the time of application the applicant was the spouse of the sponsor, Mr William Forbes and met the requirements of cl. 820.211.
43. The Tribunal is satisfied that at the time of decision the applicant would have continued to be the spouse of Mr William Forbes except that he has died. It is satisfied that the applicant has developed close business and personal ties in Australia and accordingly meets the requirements of cl. 820.221(2)(a)(b) and (c) and she also meets cl.820.221(1).

DECISION

44. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl.820.211 of Schedule 2 to the Regulations, and
 - cl.820.221(1) and (2) of Schedule 2 to the Regulations.

Maira Brophy
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.15A SPOUSE

(1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).